BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GASPAR ORTIZ-SANTIAGO Claimant V. **RAIL CAR SERVICES, LLC** Respondent AND **TECHNOLOGY INSURANCE CO.** Insurance Carrier	)	Docket No. 1,067,816

ORDER

Respondent and its insurance carrier (respondent) requests review of the October 20, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Stephen Mayer, of Kansas City, Missouri, appeared for the claimant. Kendra M. Oakes, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from October 15, 2014, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant failed to meet his burden of proving an occupational disease, but the weight of the evidence proved claimant suffered a respiratory injury from repetitive exposure to airborne agents in his employment. As a result, respondent was ordered to promptly designate an authorized pulmonary specialist to evaluate claimant's bronchial condition and provide treatment. Temporary partial disability compensation was ordered paid from June 4, 2014, until claimant is released to return to work without restrictions by the authorized physician, is deemed to be at maximum medical improvement or until further order.

Respondent appeals arguing the ALJ exceeded his jurisdiction by finding claimant suffered an injury by repetitive trauma when claimant alleged an occupational disease only. Respondent contends since claimant clearly intended to pursue an occupational disease claim and only that, the ALJ did not have the authority to award benefits for injury by repetitive trauma especially since it was not an issue before the ALJ and no notice was provided of an intent to pursue a claim for an injury by repetitive trauma or to present evidence regarding same.

Respondent argues claimant failed to prove he suffered injury by repetitive trauma or occupational disease. Respondent requests the Order be reversed and vacated.

Claimant argues the Order should be affirmed.

The issues on appeal are:

1. Did claimant meet his burden of proving he suffered injury by repetitive trauma that arose out of and in the course of his employment?

2. Did the ALJ exceed his jurisdiction and deny due process to respondent by finding claimant suffered personal injury by repetitive trauma?

FINDINGS OF FACT

Claimant worked for respondent from 2001 to November 2013. His job was to clean and sandblast wagons, which are a type of train car. Claimant testified when the sandblaster is on it is very dusty and there is a lot of pressure. The sandblaster is used to clean off rust and chemicals and is used to paint. Claimant testified he was cleaning explosive chemicals from the wagons, but was unable to identify what chemicals had been in the wagons. He was not provided training or safety equipment when he started.

Claimant testified he complained on numerous occasions about the lack of safety equipment. He was told the company didn't have money for safety equipment so none was provided. Claimant was occasionally provided with a mask. However, the masks did not have any kind of filtering and were made of cloth. Claimant complained to OSHA about the working conditions because he and others were suffering due to the working conditions and wanted to see if they could get some help. To his knowledge, OSHA did nothing and the poor working conditions continued. He testified it wasn't until 2012 that face masks were provided on occasion.

Claimant complained of lung and bone pain, chronic coughing and nosebleeds, which he related to the poor working conditions. Claimant asked to see a doctor, but was told there was no money for that either. Claimant never provided respondent with anything in writing regarding his complaints. When he was finally sent to a clinic he was told he was responsible for payment.

It wasn't until September 5, 2012, that claimant was sent to Concentra. Claimant met with Neil Mikel, M.D., on September 5, 2012, regarding lung and chest discomfort. Claimant reported having chest discomfort and shortness of breath for two years. The shortness of breath came with exertion. Dr. Mikel opined it was unclear if claimant's chest pain and shortness of breath were related to his work duties. Claimant's diagnosis was chronic chemical inhalation. He was instructed to followup with his primary care physician. It was recommended claimant see a specialist, but respondent did not send him to one.

Claimant returned to Concentra on July 11, 2013, and met with Judith Tharp, M.D., regarding exposure to various inhaled substances with only part-time use of a mask. Claimant reported pain in his lungs, shortness of breath, pain in his mid chest with deep breathing, headaches, blurred vision, abdominal pain and coughing up blood, light sensitivity, night sweats, eye pain, sinus pain, eye drainage, sore throat, wheezing and lightheadedness. Claimant could not identify the substances he inhaled. Dr. Tharp noted claimant's symptoms began 3½ years before. Dr. Tharp recommended a repeat spirometry.

Claimant testified that in 2013, respondent brought in filtered masks and safety harnesses. He testified this was approved by the doctor at Concentra. Claimant testified they were told the new masks were to protect them from the chemicals. At this time, the workers received training on how to use the masks for protection and a little training on sandblasting. Claimant testified his employment was terminated in November 2013 because he kept going to the doctor and was talking bad about the company.

Since his termination from respondent, claimant has been performing landscaping and labor work for a company. Claimant is making $8 an hour. He works when he is able. Claimant also testified that while he works at this landscaping job he has an increase in his symptoms, specifically the pain in his chest, and he runs out of air.

Although claimant no longer works for respondent, he continues to have symptoms and they have gotten worse. Claimant testified the pain and symptoms keep him from getting the job he wants.

Claimant had a pulmonary function test on March 4, 2014, which revealed his total lung capacity to be mildly decreased and abnormalities that demonstrated mild restrictive pulmonary disease.

Claimant met with H. William Barkman, M.D., on March 4, 2014, for evaluation of potential work-related symptom complex. Dr. Barkman noted claimant had been exposed to a number of compounds and cleaning agents while performing his job cleaning rail cars. Claimant had not had any exposures for six months at the time of this visit, but his symptoms have gotten worse even though he was away from work. Claimant had been coughing up blood and producing a half a cup of phlegm daily.

Dr. Barkman determined, given the little information as to the number of compounds or intensive exposure and the fact claimant's symptoms have gotten worse despite removal from exposure, that it was doubtful the prevailing cause of the majority of claimant's symptoms are work-related.

On May 1, 2014, claimant went to the University of Kansas Hospital ER with complaints of chest pain, normally intermittent, which worsened over last three days. Pain was described as stabbing in the lower sternum and claimant had been coughing up blood for three days, with fever, cough and nausea. Claimant reported his pain started in the epigastric area and radiated up the center of his chest and to his back. He also reported left sided earache, headache and intermittent episodes of chest pain over 3 years. Claimant attributed his pain to his work.

Claimant was found to be in moderate distress on arrival, with multiple complaints. Over the course of the visit, claimant began feeling better with pain control with morphine and a GI cocktail. Claimant was diagnosed with abdominal pain and epigastric chest pain. He was prescribed medication and released. Claimant was instructed to followup with his primary care physician.

At the request of his attorney, claimant met with Thomas A. Beller, M.D., a pulmonologist, for an examination on June 4, 2014. Claimant also initiated this visit on his own after suffering what he called a lung attack and really strong pain in his bones to the point he could not stand. Claimant's chief complaint was shortness of breath over the last three to four years. Dr. Beller examined claimant and diagnosed shortness of breath/cough/chest pain; chronic bronchitis; work-related dust, chemical and fume exposure; mild restrictive ventilatory defect; probable gastroesophageal reflux disease and obesity.

Dr. Beller found claimant's respiratory symptoms were associated with chronic bronchitis due to work-related chemical exposure from his employment with respondent. Claimant also had a mild degree of broncospasm and an asthmatic component associated with the bronchitis. He found claimant had some aggravation from associated gastroesophageal reflux, but did not believe this was the primary cause of claimant's respiratory symptoms. Dr. Beller opined claimant's chest pain was likely due to bronchitis and frequent episodes of coughing.

Dr. Beller recommended a trial of bronchodilator-corticosteroid combination inhaled medication, a Combivent inhaler, on an as needed basis. He recommended claimant avoid exposure to smoke, dust and respiratory irritants and avoid any type of work involving sandblasting or employment where there might be silica exposure. He recommended treatment for the gastroesophageal reflux and periodic pulmonary follow-ups. He felt weight loss and regular exercise would benefit claimant.

Dr. Beller opined claimant's chronic bronchitis is related to his work-related exposure at respondent. He recommended restrictions. He also wrote claimant is at risk to develop pneumoconiosis later. He felt the inhalation work exposure is the cause of claimant's current respiratory symptoms and the prevailing factor in his need for treatment. He recommended a neurological assessment and consultation regarding claimant's history of headaches, dizziness and visual disturbance.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Respondent contends its due process rights were violated when the ALJ found injury by repetitive trauma after pleading occupational disease. The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.[1]

> No particular form of proceeding is required to constitute due process in administrative proceedings; al that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements include the revelation of the evidence, and a conclusion based on reason; and its essential requirements are met where the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.
>
> Denial of due process occurs where the exercise of power by an administrative officer or body is arbitrary or capricious, where a decision of a board or commission is based on mere guesswork as to an essential element, or where a finding is unsupported by any evidence.[2]

Here respondent was provided a hearing and an opportunity to be heard and to defend this matter. It is noted claimant's initial Application For Hearing filed on

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[1] *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

[2] 73 C.J.S. Public Administrative Law and Procedure, sec. 59.

November 26, 2013, fails to differentiate as to whether the claim is for an accident, repetitive trauma or occupational disease. In addition, the initial request for hearing filed with the Division on July 7, 2014, also fails to specify which claimed method of injury is being claimed. There is no indication in this record that respondent attempted to clarify the basis for the claim prior to the preliminary hearing. No additional time was requested by respondent when occupational disease was alleged and all evidence presented was immediately placed into the record at that hearing. It would appear respondent determined it was adequately prepared for the hearing, regardless of the allegations by claimant.

Additionally, it has long been the law in Kansas that, in workers compensation proceedings the Board or the ALJ may conform the pleadings to the evidence.[3]

The Board finds the ALJ did not exceed his jurisdiction in finding a series of traumas rather than an occupational disease, and respondent's due process rights were not effected by the Order.

K.S.A. 2013 Supp. 44-508(d)(e) states:

> (d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.
> (e) "Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.
> "Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto. In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

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[3] See *Tedder v. Phil Blocker, Inc.*, Nos. 264,296 and 264,297, 2002 WL 598489 (Kan. WCAB Mar. 29, 2002); *Chilgren v. Topeka State Hospital (State of Kansas)*, No. 202,008, 1995 WL 715328 (Kan. WCAB Nov. 17, 1995); *Cozad v. Boeing Military Airplane Co.*, No. 169,966, 1998 WL 229853 (Kan. WCAB Apr. 24 (1998), *aff'd*. 27 Kan. App. 2d 206, 2 P.3d 175 (2000); *Wagner v. Interstate Brands Corporation*, Nos. 222,155 and 222,156, 1998 WL 304289 (Kan. WCAB May 15, 1998); and *Davenport v. Hallmark Cards, Inc.,* No.165,642, 1998 WL 462612 (Kan. WCAB July 27, 1998), all of which involved repetitive micro-trauma injuries and in which the accident date was changed to conform to the evidence adduced.

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related;
or
(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(A) states:

(f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

(g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Respondent contends claimant has failed to prove that his many breathing problems stem from his work with respondent. The lack of information regarding the kinds of chemicals present in the wagons does raise concern. However, claimant testified that there were many chemical components hauled in those cars. To separate or differentiate between the many chemical possibilities may be a factual impossibility in this instance. The medical evidence from Dr. Beller, along with claimant's description of the work and resulting physical developments, supports a finding that claimant's medical problems stem from many years of exposure to chemicals and dust inside the wagon train cars. The Order of the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Respondent was not denied its due process rights in this matter. The ALJ merely conformed the pleadings to the evidence and claimant has satisfied his burden of proving that he suffered a series of traumatic exposures while working for respondent. Those exposures are the prevailing factor leading to claimant's injuries, medical condition and current need for medical treatment.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 20, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

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HONORABLE GARY M. KORTE
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge

[4] K.S.A. 2013 Supp. 44-534a.